Supreme Court, U.S.
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No. _____

In The
Supreme Court of The United States
October Term 1997

PRINCESS CRUISES, INCORPORATED
Petitioner,

v.

GENERAL ELECTRIC COMPANY
Respondent.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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58 pp

QUESTION PRESENTED FOR REVIEW

Are the harmony and uniformity of federal maritime law served by prohibiting a federal court from looking to UCC principles when interpreting a maritime services contract, and by requiring that court to look exclusively to state common law?

LIST OF PARTIES TO THE PROCEEDING

The parties to the proceeding before this Court are the Petitioner, Princess Cruises, Inc., and the Respondent, General Electric Company. The Petitioner is a wholly-owned subsidiary of The Peninsular and Oriental Steam Navigation Company, an English company.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner Princess Cruises, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals For The Fourth Circuit, which was entered on May 8, 1998.

OPINIONS BELOW

There are two opinions/decisions from the courts below, each of which is reproduced in the accompanying appendices. The Opinion of the United States Court of Appeals For The Fourth Circuit, decided on May 8, 1998 and reversing the District Court's denial of Respondent's renewed motion for judgment as a matter of law, is published at 143 F.3d 828 and is reproduced in Appendix A herein. The unpublished Opinion and Order of the United States District Court For The Eastern District of Virginia, Norfolk Division, filed on May 13, 1997 and denying the Respondent's renewed motion for judgment as a matter of law, is reproduced in Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit, reversing the lower court's denial of Respondent's post-trial renewed motion for judgment as a matter of law, was entered on May 8, 1998. This Petition for Writ of Certiorari has been filed within 90 days after entry of the judgment by the Fourth Circuit, pursuant to Rule 13.1 of the rules of the Supreme Court.

This Court has jurisdiction to review the judgment of the Fourth Circuit by writ of certiorari under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, § 2, cl.3 of the United States Constitution provides as follows:

> Section 2. The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction; . . .

STATEMENT OF THE CASE

Princess Cruises, Inc., ("Princess") is a cruise ship agent responsible for several luxury cruise ships both within and without U.S. waters. In December, 1994, one of Princess's cruise vessels, the *S.S. Sky Princess*, arrived for a routine drydocking involving inspection and repairs at Norfolk, Virginia. Months before, Princess requested that General Electric ("GE"), the original manufacturer of the ship's main turbines, prepare an estimate for turbine inspection work to be accomplished and spare parts to be installed during the scheduled drydocking.

During the period July 1994 until November 1994 Princess and GE exchanged many letters and phone calls relating to the upcoming drydock work in December. That correspondence included Princess's purchase order to GE of October 19, 1994 and GE's fixed-price quotation to Princess of October 24, 1994. Both Princess and GE included with these documents their own respective "terms and conditions," which purported to govern the rights of the parties to the contract. For example, Princess's terms required GE to take full responsibility for its work, whereas GE's terms disclaimed certain warranties and damages.

Other than in the declarations in their pre-printed forms, neither Princess nor GE ever addressed the other party's terms and conditions prior to the drydocking. Nevertheless, both parties proceeded as though a contract had been formed. Thus, in December 1994 GE provided the agreed-upon engineering inspection services and spare parts to the *S.S. Sky Princess* during the drydocking of the vessel. Unfortunately, however, the inspection services provided by GE were wholly inadequate, causing Princess to suffer extensive losses.

One of the primary reasons that Princess engaged GE for the 1994 drydocking was for GE's engineers to supervise the removal of the port high pressure turbine rotor and carefully inspect it for continued service. GE failed to inspect the rotor with care, and it failed to align the turbine properly upon reinstallation. These errors caused excessive vibration in the ship's turbine and consequent damage to various engine components, such as packings and bearings. Because of these problems, Princess was forced to cancel two fully-booked holiday cruises, thereby losing millions of dollars.

In April 1996 Princess sued GE for its losses in the U.S. District Court for the Eastern District of Virginia, Norfolk Division, based on diversity jurisdiction conferred by 28 U.S.C. § 1332. It was stipulated that maritime law governed the contractual dispute. On January 24, 1997, after a ten day trial, the jury found that GE had breached its contract with Princess and awarded Princess $4,577,743 in damages.

One of the central issues in the case and at trial was whose "terms and conditions" controlled the rights and obligations of the parties. If Princess's terms applied, GE would have to accept financial responsibility for the full extent of the damages that it had inflicted on the vessel. If GE's terms prevailed, it would be able to limit its liability to $231,925, the price contained in its fixed-price proposal. Thus, the trial judge and eventually the jury were forced to resolve a maritime "battle of the forms."

Prior to trial, the District Court, the Honorable Henry C. Morgan, ruled that the jury would decide on the intention of the parties in entering the contract. To assist the jury in making that key factual determination, Judge Morgan instructed them under the applicable battle-of-the-forms

provisions of the Uniform Commercial Code, § 2-207. GE objected to the Court's use of UCC principles to help ascertain the intentions of the parties, maintaining that the "last shot" doctrine or "mirror image" rule of the common law should be applied. The District Court overruled GE's objections and ruled as follows:

> [I]t is unnecessary for the Court to determine whether the contract is primarily one for goods or services. In either case, the UCC is regarded as a source of federal admiralty law. [citation omitted]. While the UCC does not expressly govern maritime service contracts, "in construing a contract for services, courts are free to reason by analogy to [the UCC]." Suwannee River, 866 F.2d at 765 n.25

(App. B-9-10)

Following the adverse jury verdict and entry of judgment, GE appealed to the Fourth Circuit, contending, inter alia, that it was error for the District Court to refer to UCC principles in interpreting a maritime contract, unless the contract was predominantly for the sale of goods. On May 8, 1998 the appeals court agreed with GE. It reversed

the lower court's decision and remanded for entry of judgment against GE in the greatly reduced amount of $231,925, based on the Fourth Circuit's determination that the UCC had no application at all in maritime services contracts. Thus, in its published opinion, the Fourth Circuit announced that it was "unpersuaded" by the contrary decisions of other federal maritime circuits, and it held as follows:

> We ... hold that when the predominant purpose of a maritime or land-based contract is the rendering of services rather than the furnishing of goods, the U.C.C. is inapplicable, and courts must draw on common-law doctrines when interpreting the contract.

(143 F.3d at 830, App. A-2-3)

It is this express prohibition to admiralty courts against looking to the UCC to promote fair and uniform results in maritime service contracts which is the basis for this Petition for Writ of Certiorari. Petitioner also believes that this Fourth Circuit ruling is in derogation of this Court's mandate that maritime law "must be decided in the performance of the Court's function in declaring the general

maritime law, free from inappropriate common-law concepts." Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630 (1959).

REASONS FOR GRANTING THE WRIT

I. BY PROHIBITING COURTS FROM LOOKING TO THE UCC FOR GUIDANCE IN INTERPRETING MARITIME SERVICE CONTRACTS, THE FOURTH CIRCUIT HAS CREATED A MAJOR CONFLICT AMONG THE CIRCUITS ON AN IMPORTANT FEDERAL ISSUE.

It is well established that uniformity and harmony are two of the polestars of maritime law. Southern Pacific Co. v. Jensen, 244 U.S. 205, 216 (1917). The Fourth Circuit's holding that admiralty courts cannot use the uniformity already built into the UCC to resolve maritime contract disputes - unless such contracts involve predominantly the sale of goods - will introduce disharmony and non-uniformity on a massive scale throughout the circuits. Prior to this decision, no federal circuit had ever deprived its admiralty courts of the UCC's commercial expertise, when it was needed to fashion maritime law. In fact, the Fourth

Circuit's holding conflicts sharply with decisions of the Fifth, Ninth, and Second Circuit Courts of Appeal, each a critically important maritime jurisdiction.

The Fifth Circuit has expressly adopted UCC principles in interpreting maritime service contracts. In Clem Perrin Marine Towing, Inc. v. Panama Canal Co., 730 F.2d 186 (5th Cir. 1984), the court noted that "the U.C.C. has been regarded as a source both for admiralty and federal common law," and it applied UCC section 2-609 to a bareboat charter party, a non-sales contract. Id. at 189.

Similarly, in Employers Insurance of Wausau v. Suwannee River Spa Lines, Inc., 866 F.2d 752 (5th Cir. 1989), a vessel owner sued the builder and building supervisor to recover for losses sustained when the vessel sank. The Fifth Circuit noted that:

> The distinction between goods and services has been widely criticized, and has been particularly difficult to define in the context of "hybrid contracts" -- such as construction contracts, contracts for repairs that involve the provision or replacement of a part, or sales contracts that include installation.

Id. at 764 n.21. Accordingly, the Fifth Circuit specifically approved the adoption of UCC principles in non-sales settings: "[I]n construing a contract for services, courts are free to reason by analogy to U.C.C. § 2-316(1)." Id. at 765 n.25.

Likewise, the Court of Appeals for the Ninth Circuit has turned to the UCC to interpret a maritime service contract, the lease of cargo containers, stating, "In maritime commercial transactions, the Uniform Commercial Code is taken as indicative of the federal common law of admiralty." Interpool Ltd. v. Char Yigh Marine (Panama) S.A., 890 F.2d 1453, 1459 (9th Cir. 1989) (invoking the provisions of UCC § 1-201, in considering the interests of the parties to the lease agreement).

Finally, in Asphalt International, Inc. v. Enterprise Shipping Corp., 667 F.2d 261 (2d Cir. 1981), the Court of Appeals for the Second Circuit also looked to the UCC for commercial guidance, even though there was no sale of goods involved. In that case, a chartered tanker was rammed while loading a vessel and the charterer sued the owner, claiming breach of the owner's duty to repair the vessel. Acknowledging that the charter agreement was a maritime

contract, the Second Circuit looked to the UCC for guidance on "general principles of commercial law" regarding commercial impracticability. Id. at 265-66.[1]

Thus, the Fourth Circuit's holding prohibiting federal admiralty courts from looking to the UCC when interpreting a maritime services contract contrasts markedly with the decisions of three other circuit courts of appeals and several district courts.

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[1] Additionally, district courts within the Second and Third Circuits have also looked to the UCC to interpret maritime contracts for services and mixed contracts for goods and services. See F/V Robins Nest, Inc. v. Atlantic Marine Diesel, Inc., No. 92-3900 (JEI), 1994 WL 594592, at *2 (D. N.J. Oct. 24, 1994) (UCC is indicative of federal admiralty law and applies to an admiralty claim regarding breach of contract for repair and service of commercial fishing boats); Maru Shipping Co. v. Burmeister & Wain American Corp., 528 F. Supp. 210, 216 (S.D.N.Y. 1981) (UCC § 2-207 used to resolve battle of forms).

II. THE FOURTH CIRCUIT HAS DEPARTED FROM APPLICABLE DECISIONS OF THIS COURT BY ABDICATING THE ROLE OF FEDERAL COURTS IN FASHIONING MARITIME LAW.

By requiring admiralty courts to look exclusively to state common law to interpret maritime service contracts, the Fourth Circuit has ignored the long line of cases from this Court which have placed the responsibility for fashioning of maritime law squarely into the hands of federal courts. See East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986).[2]

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[2] The Fourth Circuit's mandate that maritime courts utilize the common law hearkens back to the English court system, which has been abandoned in this country.

During the Elizabethan and Stuart ages the rise of the common law courts in England resulted in a distinct struggle between the admiralty and common law courts over jurisdiction. See 1 Thomas J. Schoenbaum, Admiralty and Maritime Law § 1-5, at 14 (2d Ed. 1994); Charles S. Cumming, The English High Court of Admiralty, 17 Tul. Mar. L.J. 209, 237 (1993). Ultimately the crown severely circumscribed the jurisdiction of the admiralty courts. See Schoenbaum, supra, at 14-16.

The United States courts, however, in order to avoid the

Furthermore, this power of federal courts to fashion maritime law is to be zealously guarded from state law encroachment:

> Since the beginning federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several states - not derived from or dependent on their will.

Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 160 (1920).

> It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting

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inequities and strictures of the common law and to promote uniformity in maritime commerce, specifically rejected English precedent, and instead adopted a broad and separate admiralty jurisdiction. See The Propeller Genessee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851); Delovio v. Boit, 7 F. Cas. 418, 442-43 (C.C.D. Mass. 1815) (No. 3,776) (Story, J.). See also Schoenbaum, supra, § 3-1, at 56.

the intercourse of the states with each other or with foreign states.

Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 382 (1918) (quoting from The Lottawanna, 21 Wall. 558, 575, 22 L. Ed. 654 (1875)).

Moreover, in interpreting and developing maritime law, this Court has struck down state common law rules and regulatory laws which work "material prejudice to the characteristic features of the general maritime law," or interfere "with the proper harmony and uniformity of that law in its international and interstate relations." Southern Pacific Co. v. Jensen, 244 U.S. 205, 216 (1917) (holding that the award of the New York State Workmen's Compensation Commission to dependents of a longshoreman killed on ocean-going steamship was preempted by the Longshoremen's and Harbor Workers' Compensation Act). See also Kossick v. United Fruit Co., 365 U.S. 731, 742 (1961) (rejecting application of New York state statute of frauds); Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 632 (1959) (declining to apply New York common law distinction between duty owed licensee and invitee); Pope & Talbot,

Inc. v. Hawn, 346 U.S. 406, 410 (1953) (rejecting Pennsylvania common law rule under which contributory negligence of an injured person is a bar to recovery, because it deprived a claimant of substantial admiralty rights); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 166 (1920) (invalidating New York Workmen's Compensation Act, because it conflicted with maritime goal of uniformity).

This Court also considers carefully whether the state law would defeat "the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states," American Dredging Co. v. Miller, 510 U.S. 443, 451 (1994) (quoting from The Lottawanna, 21 Wall. 558, 575, 22 L. Ed. 654 (1875)), or seriously hamper and impede "freedom of navigation between the states and with foreign countries." Southern Pacific, 244 U.S. at 217. Although the requirement of uniformity is not absolute, "state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system." Romero v. International Terminal Operating Co., 358 U.S. 354, 373-74 (1959).

Petitioner maintains that, should the Fourth Circuit's abdication of this federal court power to fashion maritime contract law to the states be left undisturbed, there will undoubtedly be countless instances of "inroads on the harmonious system." Many thousands of maritime service contracts entered into each year will be interpreted differently under the nuances and vagaries of fifty versions of the common law.

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III. THE UCC SHOULD BE A STAPLE OF MARITIME LAW BECAUSE IT WAS SPECIFICALLY DESIGNED TO RESOLVE COMMERCIAL DISPUTES FAIRLY AND UNIFORMLY.

It is illustrative of the potentially severe problems introduced into maritime contract law by the Fourth Circuit that the particular issue in this case, the "battle of the forms," could have been resolved in either of two ways: by reasonably considering the intention of the parties under the UCC; or by arbitrarily looking at the "last shot" mailing under the common law. In fact, Section 2-207 of the UCC was expressly developed to avoid the inequitable and arbitrary results of the common law's "last shot" doctrine. See 1 James J. White & Robert S. Summers, Uniform Commercial Code § 1-3 (4th ed. 1995) ("The rigidity of the common law rule ignored the realities of commerce. . . . Section 2-207 rejects the common law mirror image rule. . . . . and avoid[s] favoritism because of timing . . . .") Nevertheless, the Fourth Circuit has chosen the common

law rule and applied it in the supposedly equitable domain of admiralty.

This harsh result is contrary to one of admiralty's primary goals, promoting equity in maritime commerce. See Schoenamsgruber v. Hamburg American Line, 294 U.S. 454, 457 (1935) ("courts of admiralty have capacity to apply equitable principles in order the better to attain justice . . . ."); O'Brien v. Miller, 68 U.S. 287, 297-98 (1897) ("[T]he whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them. . . [C]ourts of admiralty are not governed by the strict rules of the common law, but act upon enlarged principles of equity . . . and construe[] instruments, as a court of equity does, with a large and liberal indulgence"); Watts v. Camors, 115 U.S. 353, 361 (1885) ("[A] court of admiralty, within the scope of its powers, acts upon equitable principles; and when the facts before it, in a matter within its jurisdiction, are such that a court of equity would relieve, and a court of law could not, it is the duty of the court of admiralty to grant relief.")

It is difficult to reconcile these repeated mandates for equity in maritime matters with the Fourth Circuit's adoption of the unjust mirror image rule.

By contrast, adoption of UCC contract formation principles is completely consistent with the maritime law's promotion of equity and justice, because the UCC attempts to achieve the true intention of the parties. See U.C.C. § 2-207 cmts. 1-2 (1967) ("This section is intended to deal with . . . the exchange of printed purchase order and acceptance (sometimes called 'acknowledgment') forms . . . . Often the seller's form contains terms different from or additional to those set forth in the buyer's form. Nevertheless, the parties proceed with the transaction. . . . Under this Article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract. Therefore, any additional matter contained in the confirmation or in the acceptance . . . must be regarded as a proposal for an added term . . . .") See also 1 Thomas M. Quinn, Uniform Commercial Code Commentary and Law Digest ¶¶ 2-207[A][1], [10] (2d ed. 1991) ("Section 2-207(1) attempts to shatter this ancient learning about the need for a perfect 'match' and takes the eminently sensible position that what

passes among businessmen as an acceptance now has the legal effect of an acceptance . . . . The 'knockout' rule is a rule of presumed fairness . . . .")

This UCC rule of fairness has not gone unnoticed by the courts:

> Application of section 2-207(3) [of the UCC] is more equitable than giving one party its terms simply because it sent the last form. Further, the terms imposed by the code are presumably equitable and consistent with public policy because they are statutorily imposed.

Diamond Fruit Growers, Inc. v. Krack Corp., 794 F.2d 1440, 1445 (9th Cir. 1986). Ironically, even the Fourth Circuit has recognized the fairness of applying this UCC section:

> Thus, this [UCC] section "give[s] neither party to a contract an advantage simply because it happened to send . . . the last form." . . . Section 2-207 "disfavors any attempt by one party to unilaterally impose conditions that would create hardship on another party."

Brewster of Lynchburg, Inc. v. Dial Corp., 33 F.3d 355, 362 (4th Cir. 1994) (citations omitted).

Since the objectives of the UCC, uniformity and fairness in commercial transactions, are identical to those of maritime law, the UCC should be considered to be part of federal maritime common law in all federal circuits, including the Fourth.

CONCLUSION

Petitioner Princess Cruises, Inc., prays that this Court grant this Petition and issue a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fourth Circuit in this matter.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

Princess Cruises, Incorporated, Plaintiff-Appellee, v. General Electric Company, Defendant & Third Party Plaintiff-Appellant, v. Norfolk Shipbuilding & Drydock Corporation, Third Party Defendant.	)	No. 97-1685

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk,
Henry C. Morgan, Jr., District Judge.
(CA-96-391-2)

Argued: January 26, 1998

Decided: May 8, 1998

Before ERVIN and WILLIAMS, Circuit Judges, and
GOODWIN, United States District Judge
for the Southern District of West Virginia,
sitting by designation.

Reversed and remanded by published opinion. Judge Goodwin wrote the opinion, in which Judge Ervin and Judge Williams joined.

COUNSEL

ARGUED: Bruce Taylor Bishop, WILLCOX & SAVAGE, Norfolk, Virginia, for Appellant. Francis Xavier McCullough, WATT, TIEDER & HOFFAR, L.L.P., McLean, Virginia, for Appellee. **ON BRIEF:** John A. Wilson, Gary A. Bryant, WILLCOX & SAVAGE, Norfolk, Virginia, for Appellant. Benjamin T. Riddles, Heidi B. Hering, WATT, TIEDER & HOFFAR, L.L.P., McLean, Virginia, for Appellee.

OPINION

GOODWIN, District Judge:

This suit arises out of a maritime contract between General Electric Company (GE) and Princess Cruises, Inc. (Princess) for inspection and repair services relating to Princess's cruise ship, the SS *Sky Princess*. In January 1997, a jury found GE liable for breach of contract and awarded Princess $4,577,743.00 in damages. J.A. at 1876. On appeal, GE contends that the district court erred in denying its renewed for judgment as a matter of law, which requested that the court vacate the jury's award of incidental and consequential damages. Specifically, GE argues that the district court erroneously applied Uniform Commercial Code principles, rather than common-law principles, to a contract primarily for services. We agree and hold that when the predominant purpose of a maritime or land-based contract is the rendering of services rather than the furnishing of goods, the U.C.C. is inapplicable, and courts must draw on common-law doctrines when interpreting the

contract. Accordingly, we reverse the district court's decision denying GE's renewed motion for judgment as a matter of law and remand for modification of the judgment consistent with this opinion.

I. FACTUAL BACKGROUND

Princess scheduled the SS *Sky Princess* for routine inspection services and repairs in December 1994 and requested that GE, the original manufacturer of the ship's main turbines, perform services and provide parts incidental to the ship's inspection and repair. Princess issued a Purchase Order in October 1994. The Purchase Order included a proposed contract price of $260,000.00 and contained a brief description of services to be performed by GE. The reverse side of the Purchase Order listed terms and conditions which indicated that Princess intended the Purchase Order to be an offer. These terms and conditions also stated that GE could accept the Purchase Order through acknowledgment or performance; that the terms and conditions could not be changed unilaterally; and that GE would provide a warranty of workmanlike quality and fitness for the use intended. J.A. at 75-76.

On the same day that GE received the Purchase Order, GE faxed a Fixed Price Quotation to Princess. The Fixed Price Quotation provided a more detailed work description that Princess's Purchase Order and included a parts and materials list, an offering price of $201,888.00, and GE's own terms and conditions. When GE reviewed Princess's

Purchase Order, it discovered that Princess requested work not contemplated by GE in its Fixed Price Quotation. GE notified Princess of GE's error. On October 28, 1994, GE faxed a Final Price Quotation to Princess. In the Final Price Quotation, GE offered to provide all services, labor and materials for $231,925.00. Attached to both GE Quotations were GE's terms and conditions, which: (1) rejected the terms and conditions set forth in Princess's Purchase Order; (2) rejected liquidated damages; (3) limited GE's liability to repair or replacement of any defective goods or damaged equipment resulting from defective service, exclusive of all written, oral, implied, or statutory warranties; (4) limited GE's liability on any claims to not more than the greater of either $5000.00 or the contract price; and (5) disclaimed any liability for consequential damages, lost profits, or lost revenue. J.A. at 106-13. During an October 31, 1994 telephone call, Princess gave GE permission to proceed based on the price set forth in GE's Final Price Quotation. J.A. at 825, 1850.

On November 1, 1994, GE sent a confirmatory letter to Princess acknowledging receipt of Princess's Purchase Order and expressing GE's intent to perform the services. J.A. at 115. The letter also restated GE's $231,825.00 offering price from its Final Price Quotation and specified that GE's terms and conditions, attached to the letter, were to govern the contract. *Id.*

When the SS *Sky Princess* arrived for inspection, GE noted surface rust on the rotor and recommended that it be

taken ashore for cleaning and balancing. The parties agree that during the cleaning, good metal was removed from the rotor, rendering the rotor unbalanced. Although GE attempted to correct the imbalance, Princess canceled a ten-day Christmas cruise as a result of delays caused by the repair. At trial, Princess alleged that the continued vibration and high temperatures caused damage to the ship, forcing additional repairs and the cancellation of a ten-day Easter cruise. It was undisputed, however, that Princess paid GE the full amount of the contract: $231,925.00. J.A. at 1008.

On April 22, 1996, Princess filed a four-count complaint against GE, alleging breach of contract, breach of express warranty, breach of implied warranty, and negligence. The district court granted GE's motion for summary judgment as to the negligence claim. Following Princess's presentation of evidence at trial, GE made a motion for judgment as a matter of law, which the district court denied. At the conclusion of the defendant's presentation of evidence, the district court denied GE's second motion for judgment as a matter of law. In instructing the jury, the district court drew on principles set forth in U.C.C. § 2-207 and allowed the jury to imply the following terms as part of the contract: (1) the warranty of merchantability; (2) the warranty of fitness for a particular purpose; (3) the warranty of workmanlike performance; (4) Princess's right to recover damages for GE's alleged breach of the contract; and (5) Princess's right to recover incidental and consequential damages, as well as lost profits, proximately caused by

GE's alleged breach. On January 24, 1997, the jury returned a $4,577,743.00 verdict in favor of Princess. On February 3, 1997, GE renewed its motion for judgment as a matter of law requesting that the court vacate the jury's award of incidental and consequential damages. The district court heard oral argument on May 6, 1997. Following oral argument, the district court denied GE's renewed motion for judgment as a matter of law and issued an opinion clarifying the ruling.

II. STANDARD OF REVIEW

The Court reviews de novo the district court's denial of GE's renewed motion for judgment as a matter of law. *See In re Wildewood Litig.*, 52 F.32 499, 502 (4th Cir. 1995). Judgment as a matter of law is proper "when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment." *Singer v. Dungan*, 45 F.3d 823, 826 (4th Cir. 1995) (citation omitted). In reviewing the district court's decision, we consider the evidence in the light most favorable to the nonmovant to determine whether the evidence presented at trial was sufficient to allow a reasonable jury to render a verdict in the nonmovant's favor. *See Andrade v. Mayfair Management, Inc.*, 88 F.3J 258, 261 (4th Cir. 1996).

III. TO APPLY U.C.C. PRINCIPLES TO A MARITIME CONTRACT FOR SERVICES WOULD HINDER ADMIRALTY LAW'S GOALS OF UNIFORMITY AND PREDICTABILITY

Although GE contended that the district court was required to determine whether goods or services predominated before applying U.C.C. principles to the Ge-Princess contract, the district court found it "unnecessary for the Court to determine whether the contract is primarily one for goods or services. In either case, the UCC is regarded as a source of admiralty law." J.A. at 2024. We respectfully disagree.

One of the primary concerns of admiralty law is uniformity and predictability. *See American Dredging Co. v. Miller*, 510 U.S. 443, 450-51 (1994) (noting the constitutionally based principle that admiralty law should be "a system of law coextensive with, and operating uniformly in, the whole country") (quote *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875)); *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1137 (5th Cir. 1995) ("Uniformity and predictability are important in admiralty. . . ."). To avoid the creation of multiple and conflicting rules of decision in admiralty, the Fourth Circuit has stated that, "Absent reason to do otherwise, we prefer to adopt rules in admiralty that accord with, rather than diverge from, standard commercial practice." *Finora Co. v. Amitie Shipping, Ltd.*, 54 F.3d 209, 213-14 (4th Cir. 1995). As discussed in more detail below, standard commercial practice requires that a transaction be predominantly for the sale of good before the

U.C.C. applies. *See Coakley & Williams, Inc. v. Shatterproof Glass Corp.*, 706 F.2d 456, 460 (4th Cir. 1983); *Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974).

In its May 13, 1997 opinion, the district court correctly noted that U.C.C. principles inform admiralty law. *See Southworth Mach. Co. v. F/V Corey Pride*, 994 F.2d 37, 40 n.3 (1st Cir. 1993); *Clem Perrin Marine Towing, Inc. v. Panama Canal Co.*, 730 F.2d 186, 189 (5th Cir. 1984). However, we are unpersuaded by cases cited to support the district court's legal determination that U.C.C. § 2-207 applies to maritime transactions regardless of the nature of the transaction. *See Finora*, 54 F.3d at 212 (adopting U.C.C.'s actual notice provision in case involving lien on subcharterer's cargo, i.e., goods); *Southworth Machinery Co.*, 994 F.2d at 40 & n.3 (noting that U.C.C. is a general source of admiralty law when assessing contract for sale of goods); *Clem Perrin Marine Towing*, 730 F.2d at 188-89 (analogizing to U.C.C. when assessing option to purchase vessel). Although the Fifth Circuit has stated in a footnote that "in construing a contract for services, courts are free to reason by analogy to [a U.C.C. warranty section]," the court of appeals offered no support for its statement. *Employers Ins. of Wausau v. Suwannee River Spa Lines, Inc.*, 866 F.2d 752, 765 n.25 (5th Cir. 1989). Furthermore, the outcome of the *Wausau* case would have been the same regardless of whether the U.C.C. or the common law applied. *Compared id., with Asphalt Int'l, Inc. v. Enterprise Shipping Corp.*, 667 F.2d 261, 266 (2d Cir.

1981) (applying U.C.C. principles of contract interpretation only after traditional common-law methods of contract interpretation failed to produce a discernible result).

Given admiralty law's goals of uniformity and predictability, we find that mixed maritime contracts for goods and services are subject to the same inquiry as land-based mixed contracts. Therefore, a court must first determine whether the predominant purpose of the transaction is the sale of goods. Once this initial analysis has been performed, the court then may properly decide whether the common law, the U.C.C., or other statutory law governs the transaction. *Cf. Little Beaver Enters. v. Humphreys Rys.*, 719 F.3d 75, 79 n.7 (4th Cir. 1983) (noting that maritime contract for services was not covered by U.C.C.); *In re American Export Lines, Inc.*, 620 F. Supp. 490, 515 (S.D.N.Y. 1985). This method accords with standard commercial practice and lends predictability to maritime contracts.

IV. THE GE-PRINCESS CONTRACT WAS PREDOMINANTLY FOR SERVICES

In its order denying GE's renewed motion for judgment as a matter of law, the district court addressed GE's contention that the district court erroneously included U.C.C. principles in its jury instructions. J.A. at 2021. Both by motion and at trial, GE argued that the district court was required to find that the sale of goods predominated in the GE-Princess contract before employing U.C.C. principles in its instructions.

Although the U.C.C. governs the sale of goods, the U.C.C. also applies to certain mixed contracts for goods and services. Whether a particular transaction is governed by the U.C.C., rather than the common law or other statutory law, hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the furnishing of goods or the rendering of services. *See Coakley & Williams*, 706 F.2d at 458 ("Whether the U.C.C. applies turns on a question as to whether the contract . . . involved principally a sale of goods, on the one hand, or a provision of services, on the other."); *see also Long Island Lighting Co. v. Imo Indus. Inc.*, 6 F.3d 876, 888 (2d Cir. 1993); *Ryan v. Wersi Elecs. GmbH & Co.*, 3 F.3d 174, 181 n.3 (7th Cir. 1993). Thus, before applying the U.C.C., courts generally examine the transaction to determine whether the sale of goods predominates. *See Coakley & Williams*, 706 F.2d at 458. Because the facts in this case are sufficiently developed and undisputed, it is proper for the Court to determine on appeal whether the GE-Princess transaction was a contract for the sale of goods within the scope of the U.C.C. *Cf. Cambridge Plating Co. v. Napco, Inc.*, 991 F.2d 21, 24 (1st Cir. 1993).

In determining whether goods or services predominate in a particular transaction, we are guided by the seminal case of *Bonebrake v. Cox*, 499 F.2d 951 (8th Cir. 1974). In holding the U.C.C. applicable, the *Bonebrake* court stated:

> The test for inclusion or exclusion is not whether they are mixed but, granting that

> they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom).

Bonebrake, 499 F.3d at 960. The Fourth Circuit has deemed the following factors significant in determining the nature of the contract: (1) the language of the contract; (2) the nature of the business of the supplier, and (3) the intrinsic worth of the materials. *See Coakley & Williams*, 706 F.2d at 460 (applying Maryland law).

It is plain that the GE-Princess transaction principally concerned the rendering of services, specifically, the routine inspection and repair of the SS *Sky Princess*, with incidental-albeit expensive-parts supplied by GE. Although Princess's standard fine-print terms and conditions mention the sale of goods, J.A. at 76, Princess's actual purchase description requests a GE "service engineer" to perform service functions: the opening of valves for survey and the inspection of the ship's port main turbine. J.A. at 75. GE's Final Price Quotation also contemplates service functions, stating in large print on every page that it is a "Quotation for Services." J.A. at 107-09. The Final Price Quotation's first page notes that GE is offering a quotation for "engineering services." J.A. at 106. GE's Quotation further specifies that the particular type of service offered

is "Installation/Repair/Maintenance." J.A. at 107. The Final Price Quotation then lists the scope of the contemplated work-opening, checking, cleaning, inspecting, disassembling-in short, service functions. J.A. at 110; *see also* J.A. at 1862-68 (listing service tasks actually performed by GE). Although GE's materials list shows that GE planned to manufacture a small number of parts for Princess, Princess appeared to have had most of the needed materials onboard. J.A. at 111. Thus, the language of both the Purchase Order and the Final Price Quotation indicates that although GE planned to supply certain parts, the parts were incidental to the contract's predominant purpose, which was inspection, repair, and maintenance services.

As to the second *Coakley* factor-the nature of the business of the supplier-although GE is known to manufacture goods, GE's correspondence and Quotations came from GE's Installation and Service Engineering Department J.A. at 97, 106, 115. Evidence at trial showed that GE's Installation and Service Engineering division is comprised of twenty-seven field engineers who perform service functions, such as overhauls and repairs. J.A. at 1076. Finally, the last *Coakley* factor-the intrinsic worth of the materials supplied-cannot be determined because neither Princess's Purchase Order nor GE's Final Price Quotation separately itemized the value of the materials. Instead, both the Purchase Order and the Final Price Quotation blend the cost of the materials into the final price of a services contract, thereby confirming that services rather than materials predominated in the transaction. Although not a

Coakley factor, it is also telling that, during oral argument, Princess's counsel admitted that the gravamen of Princess's complaint did not arise out of GE's furnishing of deficient parts, but rather out of GE's deficient services. *See* J.A. at 23-27 (Princess's Complaint stating that Princess's damages arose out of "GE's inspection, supervision . . . recommendation . . . reinstallation and realignment of the turbine unit."); *cf. Wells v. 10-X Mfg. Co.*, 609 F.2d 248, 255 (6th Cir. 1979). Accordingly, we find as a matter of law that services rather than goods predominated in the GE-Princess contract.

V. UNDER COMMON LAW, GE'S FINAL PRICE QUOTATION WAS A COUNTEROFFER ACCEPTED BY PRINCESS

The parties do not dispute that a contract was formed by their exchange of documents. J.A. at 2020. And there is no dispute that the GE-Princess contract for ship inspection and repair is maritime in nature and governed by the substantive law of admiralty. *Kossick v. United Fruit Co.*, 365 U.S. 731, 735 (1961) (contract to repair ship is within admiralty jurisdiction). However, the issue here-whether courts should draw on U.C.C. principles or on common-law doctrines when assessing the formation of a maritime services contract-is undecided. When no federal statute or well-established rule of admirably exists, admiralty law may look to the common law or to state law, either statutory or decisional, to supply the rule of decision. *Byrd v. Byrd*, 657 F.2d 615, 617 (4th Cir. 1981) (admiralty may look to state law to supply rule of decision); *Bell v. Tug Shrike*, 332

F.2d 330, 334 (4th Cir. 1964) (in absence of maritime or clear-cut common-law rule, court may look to state law for rule of decision). Because the majority of states refer to common-law principles when assessing contracts predominantly for services, we choose to do the same.

Under the common law, an acceptance that varies the terms of the offer is a counteroffer which rejects the original offer. RESTATEMENT (SECOND) OF CONTRACTS § 59 (1981) ("A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer."). Virginia follows the same rule. *See Chang v. First Colonial Savs. Bank*, 410 S.E.2d 928, 932 (Va. 1991). Here, GE's Final Price Quotation materially altered the terms of Princess's Purchase Order by offering a different price, limiting damages and liability, and excluding warranties. Thus, GE's Final Price Quotation was a counteroffer rejecting Princess's Purchase Order. Although Princess could have rejected GE's counteroffer, Princess accepted the Final Price Quotation by giving GE permission to proceed with the repair and maintenance services, by not objecting to the confirmatory letter sent by GE, and by paying the amount set forth in GE's Final Price Quotation, $231,925.00, rather than the $260,000.00 price term set forth in Princess's Purchase Order. At common law, an offeror who proceeds under a contract after receiving the counteroffer can accept the terms of the counteroffer by performance. *See Diamond Fruit Growers, Inc. v. Krack Corp.*, 794 F.2d 1440, 1443

(9th Cir. 1986) (citing *C. Itoh & Co. (America) v. Jordan Int'l Co.*, 552 F.2d 1228, 1236 (7th Cir. 1977); *Durhan v. National Pool Equip. Co. of Va.*, 138 S.E.2d 55, 58 (Va. 1964) ("Assent may be inferred from the acts and conduct of the parties.") (citations omitted). Although GE and Princess never discussed the Purchase Order's and Final Price Quotation's conflicting terms and conditions, both Princess's actions and inaction gave GE every reason to believe that Princess assented to the terms and conditions set forth in GE's Final Price Quotation. *See* RESTATEMENT (SECOND) OF CONTRACTS § 19(1) (1981) ("The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act."); *Wells v. Weston*, 326 S.E.2d 672, 676 (Va. 1985) ("The mental assent of [contracting] parties is not requisite for the formation of a contract. . . . In evaluating a party's intent . . . we must examine his outward expression rather than his secret, unexpressed intention.") (citations omitted). Accordingly, we find that the terms and conditions of GE's Final Price Quotation control liability and damages in the GE-Princess transaction.

VI. THE VERDICT DEMONSTRATES THAT THE JURY IMPERMISSIBLY RELIED ON A CONTRACT OTHER THAN GE'S FINAL PRICE QUOTATION

For the reasons stated above, the jury could only have considered one contract in awarding damages: GE's Final Price Quotation. The Quotation restricted damages to the contract price, $231,925.00, and eliminated liability for

incidental or consequential damages and lost profits or revenue. Moreover, GE's Final Price Quotation controlled the warranties available to its customers. Yet the jury awarded $4,577,743.00 in damages to Princess. This verdict demonstrates that the jury relied on Princess's Purchase Order or some other contract when awarding damages. *See* J.A. at 2025 (district court opinion noting that "the jury either found that Princess'[s] Purchase Order governed or that neither parties' document established the complete contract"). As a matter of law, the jury could only have awarded damages consistent with the terms and conditions of GE's Final Price Quotation and could not have awarded incidental or consequential damages. By requesting that the Court award Princess the maximum amount available under the Final Price Quotation, *see* Appellant's Brief at 39-40; Appellant's Reply Brief at 20, GE conceded that is breached its contract with Princess and that damages consistent with its Final Price Quotation are appropriate. Accordingly, we find it unnecessary to remand for a new trial on this issue. We reverse the district court's decision denying GE's motion for judgment as a matter of law and remand for entry of judgment against GE in the amount of $231,925.00, interest to accumulate from the date of the original judgment.

REVERSED AND REMANDED

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

PRINCESS CRUISES, INC.,

Plaintiff,

v. **CIVIL ACTION NO. 2:96cv391**

GENERAL ELECTRIC COMPANY,

Defendant,

OPINION AND ORDER

On April 22, 1996, Princess Cruises, Inc. ("Princess"), filed a Four-Count Complaint against General Electric Company ("GE") alleging: (1) breach of contract; (2) breach of express warranty; (3) breach of implied maritime warranty; and (4) negligence. The Court granted GE's Motion for Summary Judgment as to Princess' negligence claim, but denied the parties cross-motions for partial summary judgment as to the contract claims. On January 16, 1997, following the Plaintiff's presentation of evidence, GE made a Motion for Judgment as a Matter of Law. The Court heard arguments and denied the motion. On January 23, 1997 following the conclusion of the defendant's presentation of evidence, the Court again denied GE's Motion for Judgment as a Matter of Law.

On January 24, 1997, a jury returned a judgment in favor of Princess in the amount of four million, five hundred seventy-seven thousand, seven hundred and forty-three dollars ($4,577,743.00). On February 3, 1997, GE filed a Renewed Motion for Judgment as a Matter of Law. Both parties thoroughly briefed the issues and the Court heard oral arguments on May 6, 1997. Following oral arguments the Court, ruling from the bench, **DENIED** GE's Renewed Motion for Judgment as a Matter of Law. This opinion will further explain the Court's rationale.

I. Facts.

The facts derived from the evidence presented at trial are substantially the same as those stated in the Court's December 23, 1996, Order denying the parties cross-motions for partial summary judgment. Princess' cruise ship, the S.S. Sky Princess (the "Ship") was scheduled for routine inspection services and repairs in December 1994, at Norfolk Shipbuilding & Drydock Corporation's ("Norshipco"), facility in Portsmouth, Virginia. Princess requested that GE, the original manufacturer of the Ship's main turbines, prepare and estimate for the inspection work to be performed. On July 13, 1994, GE prepared a Rough Order of Magnitude ("ROM") for the scheduled inspection and services. The parties agree that the ROM was not a contract, but merely an estimate for information purposes.

Around the end of September 1994, Richard Neary, GE's Proposal Engineer, requested that Michael Stephen-McRae, Princess' representative, provide some assurance

that GE would be awarded the inspection contract. In response, Princess issued a Purchase Order which GE received on October 24, 1994. The Purchase Order included a proposed contract price of $260,000.00 and contained a brief description of the work to be performed. The reverse side of the Purchase Order contained a list of Princess' terms and conditions. These terms and conditions indicated that the Purchase Order was intended to be an offer and provided that: (1) the Purchase Order could be accepted through either acknowledgment or performance; (2) the terms and conditions could not be changed unilaterally; and (3) the Seller would provide a warranty of workmanlike quality and fitness for the use intended.

On October 24, 1994, the same day that GE received the Purchase Order, GE telefaxed a Fixed Price Quotation to Princess. This Quotation provided a more detailed work description than the Princess' Purchase Order, a parts and materials list, an offering price of $201,888.00, and GE's own terms and conditions. Later that same day, GE reviewed Princess' Purchase Order and discovered that it requested work not contemplated by GE when calculating the offering price in its Quotation. GE notified Princess of the same, and on October 28, 1994, telefaxed a Final Quotation to Princess, offering to provide all the requested services for $231,925.00, approximately $30,000.00 less than the offering price of Princess' Purchase Order, but approximately $30,000.00 more than GE's original quotation.

Attached to both of GE's Quotations was a copy of GE's own terms and conditions. These terms and conditions purported to: (1) reject any terms and conditions set forth in a Customer's purchase order; (2) reject any liquidated damages; (3) limit GE's liability to the repair or replacement of any defective goods or damaged equipment resulting from defective service, exclusive of all written, oral, implied or statutory warranties; (4) limit GE's liability on any claims to not more than the greater of either five thousand dollars ($5,000.00) or the contract price; and (5) disclaim any liability for consequential damages, loss profits or lost revenue.

Neither Princess nor GE ever indicated written or verbal acceptance of the other party's terms and conditions. On November 1, 1994, GE did send a letter to Princess acknowledging receipt of its Purchase Order and expressing GE's interest to perform the services. However, the letter also restated GE's $231,925.00 offering price from its Final Quotation, and specified that GE's terms and conditions, attached to the letter were to govern the contract.

In December 1994, the Ship arrived at Norshipco's facilities in Portsmouth, Virginia. While performing the inspection and repairs, GE noted surface rust on the rotor and recommended that it be taken ashore to Norshipco for fly-ash blast cleaning and balancing. The parties agree that during this fly-ash cleaning, Norshipco unevenly and excessively removed good metal from the rotor and, as a result, the rotor was no longer properly balanced.

Attempting to correct the imbalance, GE choose to supply and reinstall new balance weights matching original factor specifications, rather than low speed balance the rotor or delay the ships departure while waiting for a high speed balance to become available. Upon departing Norshipco on December 18, 1994 the Ship experienced excessive vibration and was forced to return to port on December 19, 1994. GE shipped the rotor to its facility in Richmond, Virginia for inspection, blast cleaning and balancing. The rotor was reinstalled and other services, intended to eliminate the vibration, were completed by December 28, 1994. Nevertheless, Princess was forced to cancel a ten-day Christmas cruise as a result of the delay. Princess presented evidence that continued vibration and high temperatures caused damage to the rotor shaft, bearings, and labyrinth, forcing additional repairs and the cancellation of a ten-day Easter cruise.

II. Standard of Review for a Judgment as a Matter of Law.

A court may only grant a motion for judgment as a matter of law if, viewing the evidence in the light most favorable to the non-moving party and drawing every legitimate inference in that parties' favor, the court determines a reasonable trier of fact could only find in favor of the moving party. Tools USA and Equip. Co. v. Champ Frame Straightening Equip. Inc., 87 F.3d 654, 656-657 (4th Cir. 1996) (internal quotations and citations omitted).

III. ANALYSIS.

Princess and GE agree that they had a contract obligating GE to perform the services and supply the parts rendered during the December 1994 refit. The parties disagree as to whether Princess' Purchase Order or GE's Final Quotation was the governing document. Most of the arguments advanced by GE in its Renewed Motion for Judgment as a Matter of Law are identical to the arguments it advanced in the motion for partial summary judgment and its motions for judgment as a matter of law at the close of plaintiff's case and the close of all evidence. GE maintains that (1) its Final Quotation and terms and conditions, not Princess's Purchase Order, constitute the governing contract, and (2) that the Court erroneously included Uniform Commercial Code ("UCC") principles in its instructions to the jury.

A. Did GE's Final Quotation Govern as a Matter of Law?

As the Court stated in its December 23, 1997, Order denying the parties' cross-motions for partial summary judgment:

> The parties have presented no conclusive evidence that either party gave written or verbal acceptance of the other party's offer, or their terms and conditions. In such cases, where the manifestations of a bargained-for exchange must be deciphered form

> protracted negotiations involving an exchange of offers, letters, telefaxes, acts, and spoken words, the dispute is quintessentially about the respective parties' state of mind. See Charbonnages de France v. Smith, 597 F.2d 406, 414-415 (4th Cir. 1979). These states of mind, and the conflicting interpretations that can be drawn from their manifestations, present genuine disputes as to material issues of fact that preclude summary judgment. Id. While the Court **FINDS** that summary judgment is not appropriate, this may not necessarily be an issue for the jury. If, at the conclusion of the presentation of evidence at trial, the parties' intentions as to the contract terms have become so unequivocally clear that no genuine issue of fact remains, the Court may find these terms as a matter of law.

The evidence produced at trial did not unequivocally reveal the parties' intentions as to the contract terms. Drawing every legitimate inference in favor of Princess, the non-moving party, the Court cannot find as a matter of law that GE's Final Quotation and GE's terms and conditions constituted the governing contract. Some of the evidence

supported GE's position, but other evidence allowed the trier of fact to infer that Princess' Purchase Order, or neither parties' document constituted the complete contract.

B. The Applicability of UCC Principles.

GE's other argument is that the Court erroneously applied UCC principles to what GE characterizes as a service contract not governed by the UCC.[1] GE maintains

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1 The Court is not persuaded by the two federal decisions relied upon by GE which make references in footnotes or dicta to the general proposition that service contracts are not governed by the UCC. See, Little Beaver Enterprises v. Humphreys Railways Inc., 719 F.2d 75 (4th Cir. 1983); Employers Ins. of Wausau v. Suwannee River Spa Lines, Inc., 866 F.2d 752 (5th Cir. 1989). In Little Beaver, the Fourth Circuit affirmed a district court judgment allowing the plaintiff to recover on its service contract even though it failed to strictly comply with the contract's 30-day written notice of defect requirement. Despite the plaintiff's failure to provide written notice, the court found that the defendant had received actual notice of the defective workmanship, acted upon that notice, and had a reasonable opportunity to effect repairs. Id. at 78-79. That court distinguished, Standard Alliance Industries, Inc. v. Black Clawson Co., 587 F.2d 813 (6th Cir. 1978), cert. denied, 441 U.S. 923 (1979), relied upon by the defendant for the proposition that actual notice did not relieve the plaintiff of the duty to provide written notice. The issue in Standard Alliance was whether the defendant received any notice of the post repair defect. The defendant in Standard Alliance was notified of a defect, spent five months successfully curing the defect, and received no notice of a subsequent breach after it discontinued repair work. 587 F.2d at 824-825. On the other hand, the Little Beaver defendant clearly received notice. The issue in that case was whether the defendant's actual notice and failure to act constituted a waiver

that the Mirror Image Rule and the Last Shot Doctrine, rather than UCC § 2-207, should govern contract formation in this case. Specifically, GE maintains that as a matter of law, GE's Final Quotation was a counteroffer which was accepted when Princess allowed GE to provide the parts and services.

In the case at hand, where a hybrid contract calls for services involving the provision or replacement of parts, it is difficult to label such a contract as one for goods or services. See Employers Ins. of Wausau v. Suwanne River

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of the explicit written notice requirement in the contract. In short, the court in Little Beaver stated the basic proposition that the UCC only governs sales contracts while distinguishing a factually inapplicable case. 719 F.2d at 79 n.7. The Little Beaver opinion says nothing about the applicability of the UCC to Maritime contracts.

In Suwannee River, 866 F.2d 752 (5th Cir. 1989), the other case relied upon by GE, the Fifth Circuit held that the economic loss rule adopted in the East River case precludes recovery in maritime tort for purely economic loss stemming from negligent performance of a contract for professional services rendered as part of the construction of a vessel. Id. at 764 (referencing East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986)). Arguing that East River should be limited to sales contracts, the plaintiff maintained that while the implied warranties provided by the UCC may provide an adequate replacement for the imposition of tort duties when a defective product injures itself, no such warranties apply to service contracts not governed by the UCC. Id. The court rejected this argument in the commercial context where the parties are free to bargain for express warranties. Id. In so doing, the court noted that in construing a contract for services courts are free to reason by analogy to the UCC. Id. at 764 n. 25.

Spa Lines, Inc., 866 F.2d 752, 764 n.25 (5th Cir. 1989). However, it is unnecessary for the Court to determine whether the contract is primarily one for goods or services. In either case, the UCC is regarded as a source of federal admiralty law. Southworth Machinery Co., Inc. V. F/V Corey Pride, 994 F.2d 37, 40 n.3 (1st Cir. 1993); Clem Perrin Marine Towing, Inc. v. Panama Canal Co., 730 F.2d 186, 189 (5th Cir. 1984) (citations omitted). In deciding to apply UCC principles to an admiralty case, the Fourth Circuit has stated that "[a]bsent reasons to do otherwise, we prefer to adopt rules in admiralty that accord with, rather than diverge from standard commercial practices." Finora Company, Inc., v. Amitie Shipping, Ltd., 54 F.d. 209, 213-214 (4th Cir. 1995). While the UCC does not expressly govern maritime service contracts, "in construing a contract for services, courts are free to reason by analogy to [the UCC]." Suwannee River, 866 F.2d at 765 n.25.

In the case at hand, the Court was presented with a classic battle of the forms. The parties agree that a contract existed for the work performed on the Ship. The jury was instructed that they could find form the evidence that Princess' Purchase Order or GE's Quotation constituted the governing contract, or that neither document established a complete contract. Seeking legal standards to help guide the jury in their task of constructing a contract from the evidence presented at trial, the Court simply applied exchange of form principles that conformed to the UCC. See Finora, 54 F.3d at 213-214.

Applying the Court's instructions, the jury either found that Princess' Purchase Order governed or that neither parties' document established the complete contract. In either case, viewing the evidence in the light most favorable to Princess, the Court cannot find as a matter of law that the jury's verdict is not supported by the evidence.

Accordingly, GE's Renewed Motion for Judgment as a Matter of Law is **DENIED**.

The Clerk is **REQUESTED** to send a copy of this Order to counsel for both parties.

It is so **ORDERED**.

HENRY COKE MORGAN, JR.
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
May 12, 1997

Supreme Court, U.S.
FILED
OCT 9 1998
OFFICE OF THE CLERK

(2)

No. 98-254

In The

Supreme Court of the United States

October Term, 1998

PRINCESS CRUISES, INCORPORATED,

Petitioner,

vs.

GENERAL ELECTRIC COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Was the Fourth Circuit Court of Appeals correct in invoking the common law and RESTATEMENT (SECOND) OF CONTRACTS to supply the rule of decision in assessing the formation of a maritime services contract?

LIST OF PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

Respondent General Electric Company ("GE") itself has common stock and debt securities which are publicly traded. General Electric Company also has a number of subsidiaries in the United States and elsewhere. There are, however, only a limited number of these subsidiaries which have any outstanding equity or debt securities which are publicly held.

Those with publicly-held equity securities are:

— CAMCO, Inc. (Canada)

— General Electric Capital Corporation (formerly General Electric Credit Corporation)

— Montgomery Ward & Co., Incorporated

— Nuovo Pignone (Italy)

Those which have only publicly-held debt securities are:

— Credit DeL'Est

— Finax FS AB

— Finax KK AB

— GE Capital Aviation Services, Ltd.

— GE Capital Mortgage Services, Inc.

— GE Capital (NZ) Ltd. (New Zealand company)

List of Parties to the Proceeding (Continued)

— GE Capital PTY LTD. (Australian company)

— GECC Financial Corporation (Hawaii)

— GNA Corporation

— Gate Finance Corporation

— General Electric Capital Canada, Inc.

— General Electric Capital Services, Inc. (formerly General Electrical Financial Services, Inc.)

— General Electric Credit International, N.V.

— Imaging Financial Services, Inc. (formerly Eastman Kodak Credit Corp.)

— International GE Capital Corporation

— Mercur Bank (Austria)

— Service Bank GmbH

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OPINIONS BELOW

GE agrees with the Petitioner's identification of the opinions below which are incorporated in the Appendix to the Petition.

STATEMENT OF THE CASE

GE incorporates by reference the statement of the case recited by the United States Court of Appeals for the Fourth Circuit in *Princess Cruises, Inc. v. General Electric Co.*, 143 F.3d 828, 830-31 (4th Cir. 1998), App. A-2-6.

JURISDICTIONAL STATEMENT

Petitioner Princess Cruises, Inc. ("Princess") brought this action in the United States District Court for the Eastern District of Virginia, Norfolk Division ("District Court"), pursuant to 28 U.S.C. § 1332. Princess alleged, *inter alia*, breach of a maritime services contract. After a jury verdict in favor of Princess for primarily incidental and consequential damages, GE filed a Renewed Motion for Judgment as a Matter of Law. The Renewed Motion for Judgment as a Matter of Law requested that the District Court vacate that portion of the jury's award which reflected incidental and consequential damages, because the parties' contract had a limitation of liability provision. The District Court denied GE's Motion. GE appealed that denial and the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") reversed the District Court, thereby reducing the verdict from $4,577,743 to $231,925. *Princess*, 143 F.3d at 835, App. A-16. Princess petitioned for review of the decision of the Fourth Circuit and invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1).

REASONS FOR DENYING THE WRIT

At the crux of Princess' argument is a request for this Court to make the sweeping pronouncement that U.C.C. sales provisions are applicable to all maritime transactions, regardless of the nature of the transaction. The fallacy in this argument is that Article II of the U.C.C. is self-limiting. Article II of the U.C.C. only applies where the sale of goods is the predominant purpose of the transaction. In land-based contracts, federal circuit courts uniformly differentiate between sales contracts and service contracts when determining whether to apply the U.C.C. Princess argues that this consistent differentiation between contracts for the provision of goods and services is irrelevant in admiralty cases. Princess' position, however, will result in an inconsistent interpretation of the U.C.C., which defeats the Code's objective in achieving uniform results.

The Fourth Circuit declined to expand the U.C.C.'s reach beyond its recognized scope merely because this was a maritime case. The Fourth Circuit held that the same principles of contract formation should apply both in admiralty and land-based cases. In rejecting Princess' argument below, the Fourth Circuit stated:

> Given admiralty law's goals of uniformity and predictability, we find that mixed maritime contracts for goods and services are subject to the same inquiry as land-based mixed contracts. Therefore, a court must first determine whether the predominant purpose of the transaction is the sale of goods. Once this initial analysis has been performed, the court then may properly decide whether the common law, the U.C.C., or other statutory law governs the transaction.

Princess, 143 F.3d at 832, App. A-9. The Fourth Circuit's threshold analysis of whether the sale of goods predominated before applying the U.C.C.'s sale of goods provisions is in accord with the other circuit courts' interpretation of the U.C.C. *Id.* at 833, App. A-10. After making that determination, the Fourth Circuit found as a matter of law that the contract was predominantly for services, so the U.C.C. sales provisions were not applicable.[1] *Id.* at 832-34, App. A-9-13.

Princess nonetheless urges this Court to review the Fourth Circuit's decision based upon Princess' contention that there is a "major split" among the circuits on this issue (Pet. 7), and based upon Princess' allegation that the Fourth Circuit abdicated its role as a federal court in fashioning maritime law. Pet. 11. Princess' advocacy should be viewed in the context of what Princess ultimately asks this Court to hold: Princess urges this Court to adopt the sales provisions of the U.C.C. as a staple of maritime law regardless of the Code's inapplicability to a particular transaction, under the pretext of promoting uniformity in admiralty law. But if there is no prohibition on borrowing a body of law which would not otherwise apply to the transaction, then there will be no uniformity or predictability in maritime decisions at all.

As will hereafter follow, there is no "major conflict" between the circuits on this issue, and the Fourth Circuit correctly exercised its admiralty function of borrowing general common law principles in formulating its rule of decision where there was no established admiralty rule of law. The Fourth

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1. Princess has not petitioned for review of the Fourth Circuit's decision that the contract was for services. In fact, Princess' Question Presented For Review refers to the contract as a "maritime services contract", and the Petition identified the services alleged to be in dispute as those involving inspection and reinstallation of the ship's turbine rotor. Pet. 2.

Circuit's opinion is in accord with standard commercial practices, and consistent with the decisions of the other federal circuit courts. Princess' Writ should therefore be denied.

I.

THE FOURTH CIRCUIT'S DECISION NOT TO APPLY U.C.C. SALES PROVISIONS IN A MARITIME SERVICES CONTRACT IS IN ACCORD WITH STANDARD COMMERCIAL PRACTICE, AND DOES NOT CONFLICT WITH OTHER CIRCUIT COURT DECISIONS.

Princess cited factually and legally distinguishable cases from various jurisdictions in an attempt to persuade this Court that there is a "major conflict" between the Fourth Circuit's opinion and other circuit court decisions. Pet. 8-10. The cases Princess cited, however, do not directly address the issue in this case: whether Section 2-207 of the U.C.C. or the RESTATEMENT (SECOND) OF CONTRACTS ("RESTATEMENT") should be applied when assessing the formation of a maritime services contract. The Fourth Circuit carefully and thoroughly analyzed the same cases Princess raised in its Petition to this Court, and correctly concluded that the cases had no bearing on the question presented here. *Princess*, 143 F.3d at 832, App. A-8-9.[2]

Princess cited *Clem Perrin Marine Towing, Inc. v. Panama Canal Co.*, 730 F.2d 186 (5th Cir. 1984), for the proposition that "the U.C.C. has been regarded as a source both for admiralty and federal common law." Pet. 8. In the instant case,

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2. While Princess has included some additional district court cases to bolster its previously rejected arguments (Pet. 10 n.1), those cases do not justify concluding that there is a schism among the circuit courts which requires this Court to grant Princess' writ.

the Fourth Circuit agreed that the U.C.C. is a source of admiralty law, but disagreed that the U.C.C. applied to all maritime contracts regardless of the nature of the transaction. *Princess*, 143 F.3d at 832, App. A-8. The nature of the transaction in *Clem Perrin*, however, did not involve a maritime service contract. Instead, the dispute involved a breach of contract suit on a lease-purchase agreement. *Clem Perrin*, 730 F.2d at 187. The court looked to U.C.C. § 2-609 in determining that a defendant properly sought assurance from a plaintiff before paying the final installment of its lease. *Id.* at 191. The facts of *Clem Perrin* are quite dissimilar to those in the instant case, and therefore *Clem Perrin* does not conflict with the Fourth Circuit's decision to reject the application of U.C.C. § 2-207 to a service contract.

Princess also cited *Employers Insurance of Wausau v. Suwannee River Spa Lines, Inc.*, 866 F.2d 752 (5th Cir. 1989) for the proposition that "in construing a contract for services, courts are free to reason by analogy to U.C.C. § 2-316(1)." Pet. 9. This statement, made in a footnote, is dicta. *Wausau*, 866 F.2d at 765 n.25. In *Wausau*, the Fifth Circuit held that a maritime plaintiff could not recover for purely economic loss from a provider of professional services on a negligent performance of contract theory. *Id.* at 766. That holding has no bearing on this appeal.

The footnote in *Wausau* on which Princess relies is not controlling. The court's footnote references a U.C.C. warranty section, not Section 2-207. *Id.* at 765 n.25. Also, as the Fourth Circuit noted in the instant case, the Fifth Circuit offered no support for its statement that "in construing a contract for services, courts are free to reason by analogy to . . . [the U.C.C.]." *Princess*, 143 F.3d at 832, quoting *Wausau*, 866 F.2d at 765 n.25. The grounds for this emancipation from the recognized limits of Article II of the U.C.C. are unexplained.

More importantly, the *Wausau* court stated in the footnote that it was "unlikely that a substantially different outcome would result from the application of traditional common law contract principles". *Wausau*, 866 F.2d at 765 n.25. In the instant case, the common law's last shot doctrine and U.C.C. § 2-207 dictate diametrically different outcomes. Therefore, the *Wausau* reasoning is inapposite.

The *Wausau* court underscored the limitations on reasoning by analogy later in its opinion. The court stated:

> [I]f the contract is not governed by the U.C.C., it is not clear that the parties should be made, simply by force of analogy, to "accept the legal consequences" of making a contract subject to these particular code provisions.

Wausau, 866 F.2d at 777 n.53. Princess asks this Court to force all parties to a maritime contract to accept the legal consequences of U.C.C. 2-207 simply by force of analogy.

Princess next cited the case of *Asphalt International, Inc. v. Enterprise Shipping Corp.*, 667 F.2d 261 (2d Cir. 1981) for the proposition that maritime courts may look to the U.C.C. for commercial guidance even in cases not involving a sale of goods. Pet. 9-10. The *Asphalt* case is also inapposite. The *Asphalt* court only looked to the U.C.C. for guidance after finding that "traditional avenues of contract interpretation lead us to a *cul-de-sac*. . . ." *Asphalt*, 667 F.2d at 265. In the instant case, applying the principles of the RESTATEMENT leads to a definite answer: GE's documents constituted the contract and those documents include a limitation of liability clause. *Asphalt* is not inconsistent with the Fourth Circuit's decision.

Princess' reliance on *Interpool, Ltd. v. Char Yigh Marine (Panama) S. A.*, 890 F.2d 1453 (9th Cir. 1989) to establish a

circuit conflict is also misplaced. In *Interpool*, the court analyzed the parties' interest in a vessel under charter lease agreements. *Id.* The court reviewed California's enactment of the U.C.C. to determine whether the transaction constituted a security interest or a lease. *Id.* at 1459. The U.C.C. provisions cited were directly applicable and relevant to resolving the dispute. *Interpool*, however, did not address the issue of applying Article II of the U.C.C. to a maritime services contract, contrary to Princess' assertion that "the Ninth Circuit has turned to the U.C.C. to interpret a maritime service contract". Pet. 9. There was no issue of maritime services in *Interpool*. The Fourth Circuit's decision is not in conflict with *Interpool*'s unrelated holding.

In a footnote, Princess cited two cases not raised below. Pet. 10 n.1. These additional cases, however, are unavailing. In *F/V Robins Nest, Inc. v. Atlantic Marine Diesel, Inc.*, No. 92-3900 (JEI), 1994 W.L. 594592, at *2 (D. N.J., Oct. 24, 1994) the district court applied state law to the common law claims in the case because, in part, the application of state law did not pose a threat to uniformity. *Id.* at *2.

In *Maru Shipping Co. v. Burmeister & Wain American Corp.*, 528 F. Supp. 210, 216 (S.D. N.Y. 1981) the district court decided that Section 2-207 should be used to resolve a battle of forms, but only in a dispute involving defective goods. *Maru* involved a contract wherein the defendant sold parts to the plaintiff and performed services on the plaintiff's vessel. *Id.* at 212-13. The court initially concluded that the defendant's repair and service did *not* constitute a breach of contract. Rather, the court found that the defendant's breach involved the sale of goods portion of the contract.[3] Because the dispute centered

3. The Fourth Circuit noted that when determining whether the U.C.C. should apply to GE's service contract, "[I]t is also telling (Cont'd)

upon a sale of defective parts, as opposed to a complaint involving defective services, the court looked to Section 2-207 for guidance. *Id.* at 216. *Maru* is inapposite, however, because Princess and GE entered into a services contract and GE's only alleged breach is a failure to provide service and repair.

None of the cases which Princess cited demonstrate an inconsistency among the other circuit courts and the Fourth Circuit which this Court needs to resolve. The Fourth Circuit correctly held that admiralty courts should look to the RESTATEMENT, not the U.C.C., for the law governing the formation of a services contract.

II.

THE FOURTH CIRCUIT PROPERLY CONSIDERED THE COMMON LAW TO SUPPLY THE RULE OF DECISION IN THIS MARITIME CONTRACT DISPUTE.

A. Federal Admiralty Courts May Look to the General Common Law or State Law for a Rule of Decision when There is No Applicable Federal Admiralty Rule.

Princess accused the Fourth Circuit of abdicating its responsibility to fashion maritime law because the court accepted the RESTATEMENT as the rule of decision when assessing the formation of a maritime services contract. *See* Pet. 11. The Fourth Circuit did not abdicate its responsibility. Rather, it followed the time-honored admiralty tradition of looking to the common law when there is no admiralty rule directly on point. The Fourth Circuit correctly stated:

(Cont'd)
that. . . . the gravaman of Princess' complaint did not arise out of GE's furnishing of deficient parts, but rather out of GE's deficient services". *Princess*, 143 F.3d at 834, App. A-13. *Maru*'s holding focusing on the nature of the breach before applying the U.C.C. is therefore in accord with the Fourth Circuit's analysis.

> When no federal statute or well-established rule of admiralty exists, admiralty law may look to the common law or to state law, either statutory or decisional, to supply the rule of decision.

Princess, 143 F.3d at 834, App. A-13-14.

Borrowing common law doctrines to formulate maritime law, and to fill gaps in the law, is a well recognized role of admiralty courts.[4] Indeed, this Court recognized that the general maritime law is "drawn from state and federal sources," and that "the general maritime law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules". *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 865-66, 106 S. Ct. 2295, 2299 (1986). *See also Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 546, 115 S. Ct. 1043, 1054 (1995) (holding that it is a "fundamental feature of admiralty law . . . that federal admiralty courts sometimes do apply state law."). Because there was no settled rule on this issue in admiralty law, and because the U.C.C. is inapplicable, the Fourth Circuit had to look to either common-law rules or state law to supply the rule of decision.

Although Princess contends that "the Fourth Circuit has ignored the long line of cases from this Court which have placed

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4. Contrary to Princess' assertions, the exercise of federal maritime jurisdiction does *not* result in automatic displacement of state law. *See American Dredging Co. v. Miller*, 510 U.S. 443, 114 S. Ct. 981 (1994) (upholding the application of a Louisiana state prohibition against applying the doctrine of forum non conveniens); *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 44 S. Ct. 274 (1924) (permitting application of a New York law that provided specific performance of an arbitration clause in a maritime contract); *Madruga v. Superior Court*, 346 U.S. 556, 74 S. Ct. 298 (1954) (permitting application of a California partition remedy to supplement the availability of the *in rem* procedure of general maritime law).

the responsibility for fashioning of maritime law squarely into the hands of federal courts," (Pet. 11), Princess mischaracterizes the reasoning the Fourth Circuit used to arrive at its decision. The Fourth Circuit recognized that the contract between the parties was maritime in nature and governed by the substantive law of admiralty. *Princess*, 143 F.3d at 834, App. A-13. In deciding which substantive law to apply, the Fourth Circuit was confronted with Princess' contention that the U.C.C. applied, and GE's contention that the common law applied. *Id.* The question of which rule of law to apply was undecided in the maritime context. *Id.*, but was well settled in land-based cases.

The Fourth Circuit acknowledged that the U.C.C. was a source of admiralty law, but only if the transaction fell within the Code's scope. *Id.* at 832, App. A-9. In analyzing which rule of law to apply, the Fourth Circuit initially considered whether the contract was predominantly for services, or predominantly for the sale of goods. *Id.* at 832-34, App. A-9-13. This inquiry was predictable based upon the uniform construction of the U.C.C. by other circuit courts considering the issue in land-based disputes. The Fourth Circuit concluded that services predominated in the GE-Princess contract. *Id.* at 834, App. A-13. After concluding that the U.C.C. did not apply, the court held that:

> [W]hen the predominant purpose of a maritime or land-based contract is the rendering of services rather than the furnishing of goods, the U.C.C. is inapplicable, and courts must draw on common-law doctrines when interpreting the contract.

Id. at 830, App. A-2.

Princess cannot credibly argue that the Fourth Circuit abdicated its role in fashioning maritime law by looking to the

general common law for guidance after the Fourth Circuit concluded that the parties' contract was for services, a conclusion which Princess has not challenged. The U.C.C., like the RESTATEMENT, is simply a recognized source of uniform law to draw upon in admiralty cases, but whether or not to draw upon the U.C.C. depends upon the transaction. The question is which body of law should apply to a services contract: the RESTATEMENT, or the U.C.C. that applies exclusively to the sale of goods? The Fourth Circuit correctly held that the U.C.C. was limited to contracts predominantly for the sale of goods. After making the initial finding that the parties' contract was for services, the court reasonably declined to borrow the inapplicable U.C.C. provisions in rendering its decision. This is not a case of abdication, but rather the judicious selection of the appropriate rule of decision based upon the record.

B. Foisting the U.C.C. Sales Provisions Upon a Service Contract Contradicts the Uniform Interpretation of the U.C.C. by the Federal Circuit Courts.

For the U.C.C. to remain uniform, there must be a substantial uniformity of construction by the courts. Before applying the U.C.C. to a particular transaction in the land-based context, the federal circuit courts employ the "predominant thrust" or "predominant factor" test to determine if the contract is one for the sale of goods or services. *See Cambridge Plating Co. v. Napco, Inc.*, 991 F.2d 21, 24 (1st Cir. 1993) (stating that " '[c]ontracts whose predominant factor, thrust, or purpose is the rendition of services' are outside the scope of the U.C.C.") (citations omitted); *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 604 F.2d 737, 742 (2d Cir. 1979) (concluding that contract is for " 'service' rather than 'sale' when 'service predominates,' and sale of items is 'incidental.' "); *Advent Systems Ltd. v. Unisys Corp.*, 925 F.2d 670, 676 (3d Cir. 1991) (holding that the court considers "the purpose or essence of the contract"

when determining if the U.C.C. applies to a mixed contract.); *Coakley and Williams, Inc. v. Shatterproof Glass Corp.*, 778 F.2d 196, 197-98 (4th Cir. 1985), *cert. denied*, 475 U.S. 1121, 106 S. Ct. 1640 (1986) (noting that test is whether " 'predominant factor', or 'thrust' of the contract at issue was toward service or goods.'"); *Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 359 (5th Cir. 1988) (explaining that test is "whether the dominant factor or 'essence' of the transaction is the sale of materials or the services."); *Bailey Farms, Inc. v. NOR-AM Chem. Co.*, 27 F.3d 188, 192 (6th Cir. 1994) (following predominant factor test); *Republic Steel Corp. v. Pennsylvania Eng'g Corp.*, 785 F.2d 174, 181 (7th Cir. 1986) (stating that test for mixed contracts is whether the transaction was "predominantly one for the sale of goods with services incidentally involved, or was one for the rendition of services with the sale of goods incidentally involved.") (citations omitted); *Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974) (under this test, courts evaluate transactions to determine if the "predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, or goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom)."); *RRX Indus., Inc. v. Lab-Con, Inc.*, 772 F.2d 543, 546 (9th Cir. 1985) (deciding that when "sale predominates, incidental services provided do not alter the basic transaction.") (citations omitted); *Hope's Architectural Prod., Inc. v. Lundy's Constr., Inc.*, 781 F. Supp. 711, 713 (D. Kan. 1991), *aff'd*, 1 F.3d 1249 (10th Cir. 1993) (applying predominant factor or thrust test for hybrid contract).[5] In light of the uniformity of construction of the U.C.C. by the federal circuit courts in land-based cases, application of U.C.C. principles to the formation of a services contract in a maritime case would cause a breach of reasoning between admiralty

5. Counsel did not locate an Eleventh Circuit decision.

courts and non-admiralty courts on issues involving the formation of a services contract. This anomalous result is not justified by any peculiar concern of admiralty law. There is no reason to rewrite, and reconstrue, the U.C.C. in maritime cases, while limiting its scope in non-maritime cases.

In contrast to the discord created by interpreting the U.C.C. sales provisions differently in the maritime context, reliance on the RESTATEMENT lends predictability and uniformity when analyzing the formation of a maritime services contract. As the Fourth Circuit noted, the majority of states refer to common law principles when assessing contracts for services. *Princess*, 143 F.3d at 834, App. A-14. Application of the RESTATEMENT principles by admiralty courts leads to consistent results, regardless of jurisdiction. Application of RESTATEMENT principles also creates a unity and consistency between the law governing land-based services contracts and the law governing maritime services contracts.

Princess asks this Court to adopt as a "staple" the U.C.C. in all maritime transactions, regardless of the direct applicability of the Code to the circumstances, merely because the Code is uniform. In other words, Princess asks this Court to recognize the U.C.C. as the law in all maritime commerce cases, while at the same time ignoring the numerous and uniform cases which hold that the U.C.C. does not apply to contracts predominantly for services. Princess asks this Court to construe the U.C.C. differently when seen through the prism of maritime law for the sake of obtaining uniformity of decision throughout the country. The flaw with this approach is readily apparent.

CONCLUSION

For the foregoing reasons, Respondent General Electric Company requests this Court to deny the Petition for Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fourth Circuit in this matter.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

PRINCESS CRUISES, INCORPORATED,

Petitioner,

v.

GENERAL ELECTRIC COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF

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6 pp

PETITIONER'S REPLY BRIEF

Petitioner, Princess Cruises, Inc. ("Princess"), has been stripped of over $4.3 million of its jury verdict, because one of its ships happened to sail into a Virginia port for repairs rather than one in New York, Texas, or California. In fact, had the UCC, the federal common law of the Second, Fifth or Ninth Circuits, been followed by the Fourth Circuit, Princess would have already recovered its $4.6 million judgment. Instead, the judgment has been reduced to $231,925 by the Fourth Circuit, because that court was "unpersuaded" by the other circuits' rulings, and it chose to apply the common law of Virginia to a federal maritime dispute. That decision and the dangerous precedent it sets need to be reviewed.

Princess has asked this Court to issue a Writ of Certiorari to review the judgment of the Fourth Circuit which prohibits admiralty courts from looking to the UCC to fashion maritime law when interpreting non-sales contracts. This ruling, which orders the lower courts to look exclusively to state common law, creates an irreconcilable conflict among the circuits which will introduce chaos into maritime law. It also departs drastically from this Court's precedent of shunning state law when it interferes with the harmony and equity of admiralty law.

That critical Fourth Circuit holding is as follows:

> We . . . hold that when the predominant purpose of a maritime or land-based contract

> is the rendering of services rather than the furnishing of goods, the U.C.C. is inapplicable, and courts must draw on common-law doctrines when interpreting the contract.

(143 F.3d at 830, App A-2-3).

Respondent, General Electric Company ("GE"), has filed a Brief in Opposition ("Opp."), which bases its arguments on a mistaken reading of the Fourth Circuit's holding. According to GE:

> The Fourth Circuit correctly held that admiralty courts should look to the RESTATEMENT, not the UCC, for the law governing the formation of a services contract.

(Opp. 8). This characterization of the appellate court's holding is inaccurate: (1) the Fourth Circuit did not hold that admiralty courts "should" look to anything: it ordered the lower courts to apply state common law and prohibited them from using the UCC; (2) the RESTATEMENT was not part of the Fourth Circuit's holding, and courts were not told to look to it; as referenced above, they were ordered to look to common law; (3) the holding was not limited to the "formation" of a services contract: all issues of contract interpretation were included within the Fourth Circuit's broad ruling.

GE makes the same error in its wistful argument that there is "really" no split among the circuits. Thus, according to GE:

> Princess . . . attempt[s] to persuade this Court that there is a "major conflict" between the Fourth Circuit's opinion and other circuit court decisions. Pet. 8-10. The cases Princess cited, however, do not directly address the issue in this case: whether Section 2-207 of the U.C.C. or the RESTATEMENT (SECOND) OF CONTRACTS ("RESTATEMENT") should be applied when assessing the formation of a maritime services contract.

(Opp. 4). However, as referenced above, the Fourth Circuit did not decide that the "RESTATEMENT" "should" be applied when assessing the "formation" of a maritime services contract. Rather, it held that the "common law" "must" be applied when "interpreting" a maritime services contract. It also held specifically that the UCC cannot be applied.

GE apparently believes that there is less likelihood of federal maritime law splintering into 50 inconsistent variations under the dubious guidance of the RESTATEMENT (SECOND) OF CONTRACTS than there would be under the states' common law. This belief is misplaced. To begin with, the Fourth Circuit's holding does not elevate the RESTATEMENT to law. That secondary authority was only cited by the appellate court in dicta to prop

up its mandate to admiralty courts to use state common law. Princess Cruises, Inc. v. General Electric, 143 F.3d 828, 834 (4th Cir. 1998) (App. A, 14-15).

Moreover, even if the Fourth Circuit did rule that the RESTATEMENT should be deemed the maritime law for service contracts, there would still be an irreconcilable split among the maritime circuits. The Fourth Circuit has prohibited its admiralty courts from looking to UCC principles to fashion maritime law in non-sales transactions. By contrast, three other circuits have consistently looked to and utilized such UCC principles in maritime non-sales transactions. The Second and Ninth Circuits have unequivocally declared the UCC to be a part of the federal common law of admiralty and applied it to non-sales cases. Asphalt International, Inc. v. Enterprise Shipping Corp., 667 F.2d 261, 265 (2d Cir. 1981); Interpool Ltd. v. Char Yigh Marine (Panama) S.A., 890 F.2d 1453, 1459 (9th Cir. 1989). And the Fifth Circuit has expressly permitted its admiralty courts to draw on the commercial expertise of the UCC: "In construing a contract for services, [admiralty] courts are free to reason by analogy to [the UCC]." Employers of Wausau v. Suwannee River Spa Lines, Inc., 866 F.2d 752, 765 n.25 (5th Cir. 1989).

Obviously, as in this instant case, the results of judicial interpretation of contracts can differ radically depending on whether the UCC or the common law is applied. Therefore, as matters now stand, maritime service contracts will be construed and interpreted inconsistently

from circuit to circuit and even from state to state. It hardly needs to be said that this conflict is destructive to a uniform and harmonious maritime industry.

In summary, there is a vital national policy at stake in this case: Whether admiralty courts may have access to the uniformity, expertise, and fairness of the UCC in construing many thousands of service contracts per year. This policy decision will affect the shipping industry in such diverse areas as ship repairs, drydocking, charters, piloting, and towing, among many other non-sales transactions. The Second, Fifth, and Ninth Circuits have embraced the UCC for those activities. The Fourth Circuit has spurned it.

Petitioner asks this Court to review this intolerable situation and to enunciate a cohesive national maritime law.

Respectfully submitted,

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